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Supreme Court No. 98094-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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IN RE DEPENDENCY OF A.M.-S
SERGIO MICHEL-GARCIA,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

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# BRIEF OF AMICI CURIAE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON DEFENDER ASSOCIATION, AND LEGAL COUNSEL FOR YOUTH AND CHILDREN

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## I. IDENTITY OF AMICI AND STATEMENT OF INTEREST

The identity and interests of Amici are set forth in the Motion for Leave to File *Amici Curiae* brief filed concurrently with this brief.

## II. ISSUE PRESENTED FOR REVIEW

Whether significant constitutional considerations support courts having the inherent authority to provide use and derivative use immunity for statements made by individuals court-ordered to participate in treatment or for an evaluation tied to juvenile court proceedings, where the statements involve the divulgence of self-incriminating information.

## III. ARGUMENT

### A. Courts Have Inherent Authority to Provide Use and Derivative Use Immunity Protections

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Washington State's Constitution affords similar protections against being "compelled in any criminal case to give evidence against himself." Wash. Const. art. I, § 9. Any proceeding that may result in an individual making incriminating statements implicates this privilege. *See Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed. 274 (1973). Dependency cases and juvenile court proceedings are included within the "any

proceedings" wherein the privilege applies. *See State v. Decker*, 68 Wn. App. 246, 842 P.2d 500 (1992) (affirming Fifth Amendment protections apply in juvenile proceedings), *rev. denied*, 121 Wn.2d 1016 (1993); *In re Dependency of J.R.U.-S.*, 126 Wn. App. 786, 110 P.3d 773 (2005) (affirming Fifth Amendment protections apply in dependency proceedings).

To comply with the Constitution, a grant of immunity must "be coextensive with the scope of the privilege against self-incrimination." *State v. Carroll*, 83 Wn.2d 109, 111, 515 P.2d 1299 (1973). *See also, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 449, 92 S.Ct. 1653, 32 L. Ed. 2d 212, *reh'g denied*, 408 U.S. 931 (1972). In the case of immunity, this requires a grant of both use and derivative use immunity. *Id.* at 453 (affirming that "a grant of immunity must afford protection commensurate with that afforded by the privilege").

To ensure that these protections are meaningful, courts have inherent authority to provide use and derivative use immunity in order to ensure that the Fifth Amendment's protections are meaningful. *See State v. Escoto*, 108 Wn.2d 1, 4-7, 735 P.2d 1310 (1987) (affirming a trial court's ability to limit use of information derived from an evaluation to matters already adjudicated); *Decker*, 68 Wn. App. at 252-253 (affirming the "has the inherent authority" to grant use and derivative use immunity and bar the use of any information obtained in a subsequent proceeding).

## B. Courts Must Provide Use and Derivative Use Immunity Protections for Potentially Self-Incriminating Testimony Proffered During Services Required to Resolve Pending Dependency and Juvenile Court Proceedings

The lower court erred in finding that *State v. Decker* "has been limited to the circumstances presented in that case—a predisposition evaluation in a juvenile offender matter during which only questions relating to adjudicated matters are posed and which counsel is prohibited from attending." *Matter of Dependency of A.M.-S.*, 11 Wn. App. 2d 416, 432, 454 P.3d 117 (2019) (citing *In re Dependency of Q.L.M.*, 105 Wn. App. 532, 543-44, 20 P.3d 465 (2001)). In fact, attorneys routinely seek, and are granted, use and derivative use immunity, colloquially a "*Decker* order," to allow clients, both parents and children, to fully participate in evaluations and treatment in their dependency cases.

### 1. Courts Must Have Independent Authority to Provide Use Immunity Protections for Potentially Self-Incriminating Testimony Proffered by Parents and Children as Part of Court Ordered Services

The purpose of a dependency case is remedial. *In re Dependency of Schermer*, 161 Wn. 2d 927, 943, 169 P.3d 452, 460 (2007) (quoting *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005)) ("The primary purpose of a dependency is to allow courts to order remedial measures to preserve and mend family ties."); RCW 13.34.020 (noting a child's right to a speedy resolution of the proceedings). Therefore, for both

parents and children, the ability to obtain both use and derivative use immunity from a dependency court is imperative because it allows them to participate fully in evaluations, receive accurate diagnoses and, ultimately, obtain any treatment necessary to address the barriers to family reunification.

**a. Dependent Children Are Often Compelled to Participate in Treatment and Evaluations and Courts Must Have the Authority to Provide Use and Derivative Use Immunity to Protect Their Right Against Self-Incrimination**

Past trauma, including the trauma of separation from their families, and the instability of foster care, causes dependent youth to act out more and often requires therapeutic interventions. Turney, Kristin, and Wildeman, Christopher, *Mental and Physical Health of Children in Foster Care*, Pediatrics 138(5) at 5 (2016) (finding that children in foster care have more struggles in mental and physical health relative to children in the general population) available at https://pediatrics.aappublications.org/content/pediatrics/early/2016/10/14/peds.2016-1118.full.pdf; Rubin, David M., et al., *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119.2 Pediatrics 336-344 (2007) (finding that children in foster care experience placement instability which has a significant, negative impact on their behavioral well-being) available at

https://pediatrics.aappublications.org/content/pediatrics/119/2/336.full.pdf. Further, dependent youth, in the custody of the state, come into more regular contact with mandated reporters than non-dependent children—including DCYF social workers, group home staff, and mental health providers. *See* RCW 26.44.030(1)(a).

This convergence of factors results in dependent youth being overrepresented in the juvenile court system. Halemba, Gregory and Siegel, Gene, *Doorways to Delinquency: Multi-System Involvement of Delinquent Youth in King County* (Sep. 23, 2011) (finding youth with a history of Children's Administration legal activity/placement are three times as likely as youth with no history of Children's Administration involvement to be confronted with juvenile offender charges) available at http://www.modelsforchange.net/publications/304. We know that, once involved in the juvenile court system, dependent youth fare worse than non-dependent youth. *Id.* (noting that youth in dependency proceedings experience higher recidivism rates and longer incarceration periods).

Whenever concerns arise that a dependent child has engaged in juvenile offender conduct, the youth must be able to work with their legal advocates to quickly and safely develop a service plan designed to evaluate and, if necessary, address concerning behaviors. As a result, for the youth who are in the legal custody of the state, a judicial grant of use and

derivative use immunity is often necessary to allow a youth to undergo an evaluation and ensure full and safe participation in recommended treatment, while also protecting the child's rights.[1]

These judicially imposed protections are particularly acute for dependent youth who are alleged to have engaged in problem sexual behaviors. For those youth, both the Department of Children, Youth, and Families and/or the juvenile court, may require a Sexually Aggressive Youth (SAY) evaluation which DCYF is required to disclose to law enforcement.[2] Without use and derivative use immunity, dependent youth in need of treatment and services will be unable to participate in necessary evaluations, for fear of future criminal prosecution.

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[1] Further, dependent children are in the custody of the state. This means that the State has access to all information a dependent child might provide during treatment and no limits on how it might choose to use such information. While it is certain that for the most part the State will not use incriminating statements a child made during treatment to the child's detriment, there are certainly times where the State may want to or feel that it needs to compromise a dependent youth's right against self-incrimination to forward a state interest. Court imposed use and derivative use immunity would protect against such uses.

[2] *See* RCW 74.13.075(5) (directing that "[a] juvenile's status as a sexually aggressive youth, and any protective plan, services, and treatment plans and progress reports . . . shall be shared with relevant juvenile care agencies, law enforcement agencies, and schools, but remains confidential and not subject to public disclosure by those agencies.").

### b. Parents in Dependency Cases Have a Fundamental Liberty Interest in Their Family Integrity and Must not be Forced to Choose Between Constitutionally Protected Rights

In the context of a dependency case, allegations of criminal conduct can place a parent's Fifth Amendment right directly at odds with the parent's fundamental right to family integrity. *See Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972) (holding that parents have a fundamental liberty interest in the "companionship, care, custody, and management of [their] children."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L. Ed. 2d 473 (1996) (collecting cases and recognizing that "[f]ew consequences of judicial action are so grave as the severance of natural family ties") (quoting *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L. Ed. 2d 599 (1982)). Without a grant of both use and derivative use immunity, parents are faced with an impermissible choice between constitutionally protected rights.

The request for immunity arose in the present case after dependency had been established and the father was court-ordered to participate in an evaluation as the result of a dispositional order. Indeed, because *King v. Olympic Pipeline* allows a negative inference to be drawn as the result of the failure to testify at a dependency trial, and because the evidentiary burden is a mere preponderance, for parents facing this conundrum,

conceding dependency is often the only rational choice. *See* 104 Wn. App. 338, 355-56, 16 P.3d 45 (2000), *rev. denied*, 143 Wn.2d 1012 (2001). However, the parent will then be required to engage in evaluations and treatment or risk the permanent termination of parental rights. The only way to protect these parents from this cascading set of negative actions is for a court to step in and grant immunity that will protect the parent's ability to comply with dependency court orders, while also protecting their right to not be a witness against themselves.

This is because, as the lower court recognized, when a parent fails to fully participate in services or acknowledge the underlying transgression, providers and the state "habitually say" that the parent is "obviously in denial" and not ready to have their children back. *A.M.-S.*, 11 Wn. App. 2d at 427. Therefore, without the grant of both use and derivative use immunity to allow parents to fully engage in court-ordered services, parents are forced to choose between their constitutionally protected Fifth Amendment rights and their right to family integrity. *Id.* at 426-28 (finding, in the context of dependency cases, participation in a court-ordered psychological evaluation is "compelled" testimony). To avoid this dilemma and consistent with the constitutional authority discussed above, the Court should affirm trial courts' inherent authority to grant use and derivative use immunity for statements made in treatment.

### 2. Courts Must Have Independent Authority to Provide Use and Derivative Use Immunity Protections for Potentially Self-Incriminating Statements Proffered by Youth

Non-dependent young people charged with a juvenile offense, including a sex offense, often find themselves in need of use and derivative use immunity when they participate in evaluations and treatment that elicits information regarding pending charges and/or prior uncharged sexual behaviors. For example, the evaluation tool used for children in these situations is a Sexual Behavioral Evaluation and Risk Assessment (SBERA). For a SBERA to be accurate and comprehensive, the evaluator must obtain candid, accurate, and complete information from the youth. In such instances, evaluators ask youth for a great deal of information about the offense, their sexual, medical, social and family history, and their support system. At the conclusion of the evaluation, the evaluator uses the information provided to assess risk pursuant to the Juvenile Sex Offender Assessment Protocol and/or the Estimate of Risk of Adolescent Sexual Offending Recidivism and makes treatment recommendations. As noted, evaluators typically ask about charged and uncharged problematic sexual behaviors.

Disclosure of such conduct is necessary to complete the evaluation but also leads to efforts to identify and provide critical therapy and support to victims and the young person being evaluated. These are all important

goals that cannot be served without candid participation by the youth. At the same time, candid participation can open the youth to criminal liability. Use and derivative use immunity protections are critical to a youth's ability to provide candid and specific statements during an evaluation, without fear that those statements will form the basis of additional charges. Without use and derivative use immunity in place, defense counsel will sometimes advise a young person not to undergo an evaluation or may advise a youth to be truthful about uncharged incidents of problem sexual behavior but to not share specific information about the time, place or victim of any uncharged offense since that information could lead to additional legal liability. This may protect the youth against future charges but would potentially undermine the youth's ability to receive treatment tailored to their specific needs, which harms the youth, the long-term goals of treatment, and victims who could potentially receive help.[1] In King County juvenile court, SBERAs are also frequently used during plea negotiations as the State relies on information from the SBERA to make decisions regarding possible resolutions. These plea negotiations are critical as the

youth often seeks a resolution that will not subject them to harmful sex offender registration and notification laws.[3]

A SBERA may be ordered by the Court when a youth is eligible for a special sex offender disposition alternative (SSODA). *See* RCW 13.40.162(1)(3). As noted, the evaluation includes a significant amount of information, including the "respondent's version of the facts[,]" "the respondent's offense history[,]" "an assessment of problems in addition to alleged deviant behaviors[,]" and a proposed treatment plan. RCW 13.40.162(2)(a)-(b). *See also* WAC 246-930-320. If a SSODA is granted, the court suspends the disposition, which often includes a significant period of incarceration, on the condition that the youth participate in community-based sex offender treatment. *See* RCW 13.40.162. However, for a youth, the victim, and society to receive the benefit of a SSODA the youth has to

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[3] Researchers have found that sex offender and notification laws subject youth to significant harm and are associated with the worst possible outcomes for children, including increased suicide attempts and increased sexual victimization. Youth subjected to these policies face increased risk for other serious mental health problems, risks to their physical safety, peer problems, and problems at school. The parents of children subjected to these policies also indicate emotional distress and fear for the lives of their children, with good reason. These risks are in no way offset by any increase in public safety. *See* Letourneau, E. J., Harris, A. J., Shields, R. T., Walfield, S. M., Ruzicka, A. E., Buckman, C., Kahn, G. D., & Nair, R.*Effects of Juvenile Sex Offender Registration on Adolescent Well-Being*: an empirical examination. 24(1) *Psychology, Public Policy, and Law,* 105–117 (2018). Comartin, Kernsmith, & Miles, *Family Experiences of Young Adult Sex Offender Registration*, 19 Journal of Child Sexual Abuse 204-225 (2010); Letourneau, E. J., & Caldwell, M. F. (2013), *Expensive, Harmful Policies That Don't Work*: *how juvenile sex offending is address in the U.S.* 8 International Journal of Behavioral Consultation and Therapy 23-29.

be willing to provide potentially self-incriminating information and evidence.

Therefore, without the grant of both use and derivative use immunity to youth to fully engage in a SBERA, youth are forced to choose between their constitutionally protected Fifth Amendment rights and accessing a critical assessment and engaging in necessary treatment. To avoid this dilemma, and consistent with the constitutional authority discussed above, the Court should affirm trial courts' inherent authority to grant use and derivative use immunity for statements made in evaluations necessary for the receipt of treatment services.

### C. A Statutory Grant of Immunity, Pursuant to RCW 26.44.053(2), Is Insufficient to Protect the Rights of Parents and Children in Dependency Cases

The statutory grant of immunity is insufficient in some cases to protect individuals in all of the situations discussed in this brief: dependent children and their parents, and children in juvenile offender proceedings. RCW 26.44.053(2) is insufficient to protect the constitutional rights of children and parents in dependency proceedings because the statutory protections are limited and the scope of who is within the ambit of its protections is unclear for the following reasons:

*First*, this provision does not provide any immunity for evaluations of children who are alleged to have engaged in misconduct. RCW

26.44.053(2) (providing immunity only for information given at an "examination of the parent or any other person having custody of the child"). *Second*, this provision appears to contemplate a court-ordered evaluation in a dependency case during shelter care (before a finding of dependency). *Id.* (providing for a hearing when it has been "alleged" that a child has been subjected to abuse or neglect). However, parents cannot be court ordered to participate in services during shelter care. RCW 13.34.065(4)(j) ("The court may not order a parent to undergo examinations, evaluation, or services at the shelter care hearing unless the parent agrees to the examination, evaluation, or service"). *Third*, it is also unclear whether this provision would protect a parent who had admitted to dependency pursuant to RCW 13.34.030(6)(c), where the dependency is not based on allegations of abuse or neglect. As such, a ruling that trial courts have inherent authority to grant use and derivative use immunity is necessary to protect parents' interests.

## IV. CONCLUSION

For the foregoing reason Amici request that this Court affirm the trial court's ability to provide meaningful protections to Fifth Amendment rights through grants of use and derivative use immunity in court ordered proceedings and treatment or where an evaluation is required for the

resolution of pending juvenile offender charges—all of which involve the divulgence of self-incriminating information.

DATED this 5th day of June, 2020.

Respectfully submitted,

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# KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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